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# NOTES

## THE STANDARD OF EMPLOYER LIABILITY FOR CONDUCT OF SUPERVISORY PERSONNEL UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT

### I. Introduction

In 1970, Congress passed the Occupational Safety and Health Act (the Act) to address the epidemic problem of injuries in the American workplace.<sup>1</sup> The Act was not intended to provide compensation for the injured employee nor to affect existing compensation statutes.<sup>2</sup> Rather, the congressional purpose was prophylaxis: "through the exercise of its powers to regulate commerce . . . , to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . ."<sup>3</sup>

The Act imposes a general duty on employers to provide a work environment "free from recognized hazards that are causing or are likely to cause death or serious physical harm."<sup>4</sup> In addition, the Act creates a special duty to follow standards created by the Secretary

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1. 29 U.S.C. §§ 651-78 (1970).

The report of the Senate Labor and Public Welfare Committee states: "The purpose of [the Act] is to reduce the number and severity of work-related injuries and illnesses which, despite current efforts of employers and government, are resulting in ever increasing human misery and economic loss." S. REP. No. 1282, 91st Cong., 2d Sess. 1 (1970).

The Senate committee report states further:

14,500 persons are killed annually as a result of industrial accidents; accordingly, during the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work — many times more than are lost through strikes.

In addition to the individual human tragedies involved, the economic impact of industrial deaths and disability is staggering. Over \$1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over \$8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses.

*Id.* at 2.

2. 29 U.S.C. § 653(b)(4) (1970).

3. *Id.* § 651.

4. *Id.* § 654.

of Labor in recognition of certain dangerous circumstances.<sup>5</sup> The Act also establishes an employee duty to comply with these standards.<sup>6</sup> Ultimate responsibility for compliance, however, lies with the employer.<sup>7</sup>

A recent decision<sup>8</sup> has highlighted a difference of opinion arising among the United States courts of appeals regarding the parameters of employer responsibility under the Act for the conduct of employees. Prior to this decision the courts had been in apparent agreement that Congress intended a limited standard of reasonable diligence.<sup>9</sup> The Fourth Circuit, however, in *Ocean Electric Corp. v. OSHRC*,<sup>10</sup> indicated that a more stringent standard of liability should apply when the negligent actions of foremen, acting in their supervisory capacity, result in the injury or death of rank-and-file personnel.<sup>11</sup> In essence, the court distinguishes between employer liability for supervisors and for employees.<sup>12</sup> The greater number of circuits have not been confronted with the factual situation presented in *Ocean*.<sup>13</sup> Those that were, tended to equate supervisory personnel with employees and applied an equivalent standard of responsibility.<sup>14</sup> This Note will examine the Fourth Circuit's decision in *Ocean*, and will attempt to analyze it in light of the rationale applied by the other circuits in similar circumstances.

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5. *Id.* § 654(c)(2).

An employer acting in compliance with a promulgated standard is deemed to be in compliance with his general duty to the extent of that standard. 29 C.F.R. § 1910.5 (f) (1977).

6. 29 U.S.C. § 654(b) (1970).

7. *Id.* § 666.

8. *Ocean Electric Corp. v. OSHRC*, No. 76-1060 (4th Cir. Aug. 2, 1977) [hereinafter cited as *Ocean*].

9. *Getty Oil Co. v. OSHRC*, 530 F.2d 1143, 1145 (5th Cir. 1976); *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 571 (5th Cir. 1976); *Brennan v. Butler Lime and Cement Co.*, 520 F.2d 1011, 1017 (7th Cir. 1975); *Cape and Vineyard Div. of the New Bedford Gas and Edison Co. v. OSHRC*, 512 F.2d 1148, 1155 (1st Cir. 1975); *Brennan v. OSHRC (Hanovia)*, 502 F.2d 946, 947 (3d Cir. 1974); *REA Express, Inc. v. Brennan*, 495 F.2d 822, 825-26 (2d Cir. 1974); *National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973); See also Case Comment, *Employee Noncompliance with OSHA Safety Standards*, 90 Harv. L. Rev. 1041 (1976).

10. No. 76-1060 (4th Cir. Aug. 2, 1977).

11. *Ocean*, slip op. at 10.

12. *Id.* at 10-11.

13. *Id.* at 10.

14. See cases cited in *Ocean*, slip op. at 10 n.6.

The courts dealing with factual situations similar to *Ocean* have not made any explicit distinction between supervisory and rank and file employees. See *Getty Oil Co. v. OSHRC*, 530 F.2d 1143 (5th Cir. 1976); *Cape and Vineyard Div. of the New Bedford Gas and Edison Co. v. OSHRC*, 512 F.2d 1148 (1st Cir. 1975); *REA Express, Inc. v. Brennan*, 495 F.2d 822 (2d Cir. 1974).

The Act is administered by the Occupational Safety and Health Administration (OSHA), through the imposition of fines, and in some instances, upon conviction, criminal penalties on employers who maintain hazardous working conditions in violation of their congressionally imposed duties.<sup>15</sup> After determination by an administrative law judge, contested citations and penalties are reviewed by the Occupational Safety and Health Review Commission (the Commission).<sup>16</sup> Judicial review of the Commission's decisions is available in the United States courts of appeals to any aggrieved person and to the Secretary of Labor.<sup>17</sup> The Commission's findings of fact, if not supported by substantial evidence on the record considered as a whole, are within the scope of judicial review.<sup>18</sup> One court has held that apart from questions of fact, the Commission's adjudications can be set aside when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>19</sup>

Actual injury or death is not required for finding a violation of either general or specific employer duties.<sup>20</sup> Violations under the Act are divided into three categories: willful, serious, and simple violations.<sup>21</sup> A finding of a willful violation does not require moral turpitude.<sup>22</sup> It does, obviously, require a showing of willfulness or constructive willfulness as evidenced by repetitive violations.<sup>23</sup> A serious violation exists when dangerous conditions or practices in the workplace create a substantial probability that death or serious

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15. 29 U.S.C. § 666 (1970).

16. *Id.* § 659(c).

17. *Id.* § 660. Aggrieved persons may obtain review in any of the following United States courts of appeals: (a) the circuit in which the violation is alleged to have occurred, (b) the circuit in which the employer has its principal office, or (c) the District of Columbia Circuit. The Secretary is limited to review in either the circuit in which the violation is alleged to have occurred, or the circuit in which the employer has its principal office. *Id.*

18. *Id.* § 660(a).

19. *Brennan v. OSHRC (Hanovia)*, 502 F.2d 946, 951 (3d Cir. 1974) (citing 5 U.S.C. § 706(2)(A)(1970)).

20. The employer's duty is to provide a workplace free of recognized hazards and to comply with promulgated standards. 29 U.S.C. § 654(a)(1970). There are, however, provisions for more serious penalties when death results from a violation. *Id.* § 666(e).

21. *Id.* §§ 666(a)-666(c).

22. *United States v. Dye Construction Co.*, 510 F.2d 78, 82 (10th Cir. 1975); *F.X. Messina Construction Corp.*, 505 F.2d 701, 702 (1st Cir. 1974).

23. 29 U.S.C. § 666(a) (1970). The provisions of the Act concerning willful violations are not limited to grievously dangerous situations, but include circumstances that would constitute a simple violation if the requisite willfulness were not present. *Id.*

physical harm could result.<sup>24</sup> For a serious violation to be established, however, an employer must have knowledge, actual or implied, of the existence of the violation.<sup>25</sup> The burden of proving employer knowledge is upon the Secretary of Labor.<sup>26</sup>

## II. *Ocean Electric Corp. v. OSHRC*

Petitioner corporation in *Ocean Electric Corp. v. OSHRC*<sup>27</sup> had a contract to install equipment in an electrical power substation. Ocean's foreman, put in charge of the work by the job superintendent, negligently left open a box containing energized bus bars.<sup>28</sup> The foreman then gave orders to an employee causing him to come in contact with the open area of the box. The employee was electrocuted.<sup>29</sup>

Ocean was cited for a serious violation of a promulgated safety standard<sup>30</sup> and assessed a fine of \$700.<sup>31</sup> The corporation contested the citation which was affirmed by an administrative law judge.<sup>32</sup> In turn, the judge's order was affirmed by the Commission.<sup>33</sup> The Commission reasoned that an employer is not liable for the negligent actions of supervisory personnel if the employer had exercised all reasonably possible avenues of prevention.<sup>34</sup> It found, however, that Ocean did not show the accident to be unpreventable, because it failed to show the extent of its safety training program.<sup>35</sup>

The Fourth Circuit affirmed the Commission's order,<sup>36</sup> but rejected its conclusion that an employer is not liable for the unpreventable actions of its foremen.<sup>37</sup> The majority distinguished the situation in which an employee is injured or killed due to his own suicidal or willfully reckless behavior, from injuries or death resulting

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24. *Id.* § 666(j).

25. *Id.*

26. *Brennan v. OSHRC*, 511 F.2d 1139, 1145 (9th Cir. 1975).

27. No. 76-1060 (4th Cir. Aug. 2, 1977).

28. *Ocean*, slip op. at 4.

29. *Id.*

30. 29 C.F.R. § 1926.957(a)(3) (1977). This regulation provides that extraordinary caution be exercised in the conduct of work in energized substations.

31. *Ocean*, slip op. at 2.

32. 3 OCC. SAF. & HEALTH DEC. (CCH) ¶ 18,422 (1975).

33. 3 EMPL. SAF. & HEALTH GUIDE ¶ 20,167.

34. *Id.* at 23,994.

35. *Id.*

36. *Ocean*, slip op. at 12.

37. *Id.* at 5.

from unsafe conditions and negligently inadequate instructions given by a supervisor.<sup>38</sup> Although the employer argued that it should not be held liable for its foreman's mere human errors, the court concluded that a corporation cannot be separated from its supervisory personnel.<sup>39</sup> The late Judge J. Braxton Craven, writing for the majority, emphasized, "a corporation can furnish its employees with safe working conditions only by acting through its managerial and supervisory personnel."<sup>40</sup> Thus, the prevailing opinion in *Ocean* embraced a standard of *respondeat superior* for applying the sanctions of the Act in situations of serious violations caused by supervisory personnel.<sup>41</sup>

The other opinions questioned whether the standard of *respondeat superior* was proper in light of the congressional intent. Chief Judge Clement F. Haynesworth, Jr., in a concurring opinion, indicated his belief that the majority's imputation of the foreman's acts created a standard of strict liability and that this standard was not intended by Congress.<sup>42</sup> The company, according to the concurring opinion, "is responsible for its foreman's conduct unless it does everything reasonably possible to assure compliance with the Act."<sup>43</sup> The effect of this standard is to focus analysis upon the employer's safety training program in order to determine whether it has ex-

38. *Id.* at 5, 6.

39. *Id.* at 8.

40. *Id.*

41. *Id.* at 11. The court states, "We agree with the Administrative Law Judge that '[a]n employer is responsible for the acts of a foreman performed in the course of his employment.'" *Id.* (emphasis added).

In addition to its imputation analysis, the majority indicated that the foreman's instructions to the employee, in violation of the safety regulation constituted evidence of Ocean's failure to maintain an adequate safety-training program, and to exercise reasonable precaution for prevention of the accident. *Id.* at 12. The court said, in dictum, that the doubt raised by the foreman's order rendered insufficient a stipulation that Ocean engaged a private contractor for the purpose of instructing its employees in safety techniques. *Id.*

42. *Id.* at 13-14 (Haynesworth, C.J., concurring).

The House Education and Labor Committee report stated:

An employer's duty under [section 651] is not an absolute one. It is the Committee's intent that an employer exercise care to furnish a safe and healthful place to work and to provide safe tools and equipment. This is not a vague duty, but is the protection of the worker from preventable dangers.

H.R. REP. No. 91-1291, 91st Cong., 2d Sess. 21 (1970).

Chief Judge Haynesworth, however, would apply a stricter standard in the case of a violation caused by a company president not subject to internal discipline for his acts. *Ocean*, slip op. at 14 n.1 (Haynesworth, C.J., concurring).

43. *Id.* at 14.

hausted all reasonably possible means of compliance.<sup>44</sup> The concurrence agreed with the Commission's determination that Ocean failed to show the adequacy of its training program.<sup>45</sup>

Judge John A. Field, Jr. disapproved the affirmance of the citation.<sup>46</sup> His dissent defined the majority's approach as based in tort concepts, and indicated his belief that Congress intended a different standard.<sup>47</sup> "The Act," stated the dissenting opinion, "is addressed to *conditions*, not isolated episodes of negligence."<sup>48</sup> Citing a Fifth Circuit decision,<sup>49</sup> the dissent asserted that it is improper to find an employer liable through an imputation theory for the "unpreventable *acts*" of its foremen.<sup>50</sup> The dissenting opinion, however, stated that a proper item for imputation might be a foreman's knowledge of a static condition.<sup>51</sup>

The dissent averred that the result of the rationale of the commission and the concurring opinion would require parties seeking to protest a citation under the Act to introduce evidence of their safety training programs.<sup>52</sup> "[T]his," said the dissenting opinion, "places an intolerable burden upon the employer which is utterly at variance with the plain language and objectives of the Act."<sup>53</sup>

### III. The Earlier Decisions

#### A. The Standard of Liability in Serious Violation Cases

A foreman for the petitioner corporation in *National Realty and Construction Co. v. OSHRC*<sup>54</sup> was killed while riding on the running

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44. *Id.* at 15-16.

45. *Id.* Ocean claimed inadequate notice that its safety training program would be in issue. To this, the concurring opinion asserted Ocean's own answer to the Commission's complaint as showing notice to the company. *Id.* Ocean's answer asserted that it "had taken all reasonable precautions . . . in planning the work, . . . in training its employees to avoid unsafe practices, and in taking all practical steps to insure the safety of its employees." *Id.* The dissenting opinion, however, concluded that by basing its decision on Ocean's safety program, the Commission violated its own rules of procedure and the corporation's due process rights. *Id.* at 25-26 (Field, J., dissenting).

46. *Id.* at 17.

47. *Id.* at 19-20.

48. *Id.* at 20.

49. *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976).

50. *Ocean*, slip op. at 21 (Field, J., dissenting).

51. *Id.*

52. *Id.* at 25-26.

53. *Id.* at 26.

54. 489 F.2d 1257 (D.C. Cir. 1973).

board of a front end loader in contravention of company policy.<sup>55</sup> The Court of Appeals for the D.C. Circuit reversed the Commission's affirmance of a finding of a serious violation of the employer's general duty under the Act.<sup>56</sup> The court indicated that an employer might have a greater duty to ensure the proper conduct of supervisors than rank and file employees.<sup>57</sup> But *National Realty* concluded that an employer's duty to maintain a workplace free of recognized dangerous conditions does not include the eradication of unpreventable hazardous conduct.<sup>58</sup> The court defined unpreventable hazardous conduct as:

[conduct] so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program. Nor is misconduct preventable if its elimination would require methods of hiring, training, monitoring, or sanctioning workers which are either so untested or so expensive that safety experts would substantially concur in thinking the methods infeasible.<sup>59</sup>

*National Realty*, however, indicated that equipment riding should not be included within the class of instances of unpreventable hazardous conduct.<sup>60</sup> Rather, the decision turned on the Secretary's failure to carry his burden of proof by not showing with particularity the feasibility of preventing this type of conduct.<sup>61</sup>

*Ocean's* majority correctly distinguished *National Realty* by stating that it involved a foreman acting in a nonsupervisory capacity.<sup>62</sup> The dissent in *Ocean* read *National Realty* as standing for the proposition that the Act applies only to hazardous conditions as opposed to isolated instances of negligence.<sup>63</sup>

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55. *Id.* at 1262.

56. *Id.* at 1268. The majority of the Commission found the implementation of the company policy against equipment riding inadequate and that more positive steps were required to be considered in compliance under the Act. *Id.*

57. *Id.* at 1267 n.38.

58. *Id.* at 1266.

59. *Id.*

60. *Id.* at 1267.

61. *Id.*

62. *Ocean*, slip op. at 10.

63. *Id.* at 20 (Field, J., dissenting). *Ocean's* dissent further relied on the language in *National Realty* to support its contention that the employer's due process rights were violated by the Commission:

An employer is unfairly deprived of an opportunity to cross-examine or to present rebuttal evidence and testimony when it learns the exact nature of its alleged violation only after the hearing. As noted above, the Secretary has considerable scope before and



A fatal accident occurred in *REA Express, Inc. v. Brennan*<sup>64</sup> when a corporation's supervisors permitted untrained personnel to work on high voltage electrical equipment under dangerous conditions.<sup>65</sup> Without discussing the question of imputation, the Second Circuit upheld the Commission's order finding the employer liable for a serious violation of his general duty under the Act.<sup>66</sup> In so finding, the court emphasized the employer's duty to furnish a safe workplace.<sup>67</sup> If this implies an imputation of the employer's responsibility from the actions of its supervisory personnel, the implication is not without its boundaries. Indeed, the court noted that the Act does not impose a standard of absolute liability on the employer.<sup>68</sup>

The court indicated that the employer's duty under the Act is not the same as at common law.<sup>69</sup> Whether this difference in duties excludes the doctrine of *respondeat superior* from being applied when supervisors create conditions dangerous to other employees is

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during a hearing to alter his pleadings and legal theories. But the Commission cannot make these alterations itself in the face of an empty record. To merit judicial deference, the Commission's expertise must operate upon, not seek to replace, record evidence.

489 F.2d at 1287 (footnote omitted).

64. 495 F.2d 822 (2d Cir. 1974).

65. *Id.* at 824. The dangerous conditions consisted of water on a concrete floor near the high voltage area, and "a lack of insulated equipment." *Id.*

66. *Id.* at 827.

67. *Id.* at 825-26.

68. *Id.*

69. *Id.* at 825. The court refused to accept the corporation's contention that the common law defenses of contributory negligence and assumption of the risk should apply. Nor would the court accept the employer's claim of exculpation by way of an independent contractor. *Id.* at 825-26.

The court specifically eschewed congressional language to the effect that the general duty clause restates the employer's common law duty. *Id.* at 825 (citing Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 Harv. L. Rev. 988, 1003 n.66 (1973)).

The Senate Committee Report states:

Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. . . . Statutes usually increase but sometimes modify this duty. The Committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. [The general duty clause], in providing that employers must furnish employment "which is free from recognized hazards so as to provide safe and healthful working conditions," merely restates that each employer shall furnish this degree of care.

S. REP. NO. 1282, 91st Cong., 2d Sess. 9 (1970). See H.R. REP. NO. 1291, 91st Cong., 2d Sess. 21 (1970).

not clear from the opinion. *Ocean* read *REA Express* as affirming the finding of a violation because the corporation's supervisory personnel were aware of the dangerous condition.<sup>70</sup>

In *Getty Oil Co. v. OSHRC*,<sup>71</sup> an employee was instructed by the corporation's area engineer to have a pressure vessel constructed and tested for use on an oil rig. Although the engineer emphasized the necessity of pressure testing, the employee installed the vessel untested. An explosion occurred resulting in the death of that employee. Prior to the installation of the vessel the area engineer and two other supervisors had opportunities to inquire whether it had been tested.<sup>72</sup> Based on their failure to inquire, the Fifth Circuit upheld the Commission's determination that Getty failed to exercise reasonable diligence to discover the hazard and thus had committed a serious violation of its general duty under the Act.<sup>73</sup> In so finding, the court stated that "[t]he section is intended neither to impose liability on the employer for an employee's negligence on a *respondeat superior* basis, nor to create a standard of absolute liability."<sup>74</sup> Despite this language, in imputing the supervisor's failure to inquire to the employer, the court appears to distinguish employees from supervisory personnel.<sup>75</sup>

Two months before its decision in *Getty*, the Fifth Circuit discussed the imputation problem in *Horne Plumbing & Heating Co. v. OSHRC*.<sup>76</sup> In *Horne*, two foremen were killed in a collapse of an unshored portion of a work trench. The foremen were working in this unprotected area in contravention of their employer's express instructions and past safety policy.<sup>77</sup> The administrative law judge

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70. *Ocean*, slip op. at 10. The court, however, indicated that *REA Express* was cited by petitioner as support for its argument that the scope of the Act does not include unpreventable and unforeseeable employee acts. *Id.*

71. 530 F.2d 1143 (5th Cir. 1976).

72. *Id.* at 1144.

73. *Id.* at 1146.

74. *Id.* at 1145 (emphasis in original).

75. The court does not find the requisite employer knowledge of the dangerous condition from the deceased employee's knowledge of the fact that the vessel was untested, but finds it constructively from the area engineer's recognition of the danger. The court stated, "[T]hus it is clear that the hazard at issue here was both 'recognized' and likely to cause serious harm, as well as preventable by the simple expedient of pressure testing. *Getty's* recognition of this fact was thoroughly established by the fact that King [the area engineer] had emphasized the need for testing." *Id.* at 1145 (emphasis added).

76. 528 F.2d 564 (5th Cir. 1976).

77. The court in *Horne* emphasized the employer's past safety record and procedures. *Id.* at 566-67.

concluded that the employer's instructions did not bar a finding of a serious violation of the Act, holding that under the principles of agency law, the knowledge of the foreman was that of the employer.<sup>78</sup> The court of appeals emphasized that in order to prove a serious violation the Secretary had the burden of showing employer knowledge under section 666(j) of the Act.<sup>79</sup> In reversing the Commission's affirmance of the citation,<sup>80</sup> the court refused to impute the knowledge of the deceased foreman to the employer, stating:

It was error to find Horne [the employer] liable on an imputation theory for the unforeseeable, implausible, and therefore unpreventable acts of his employees. A contrary holding would not further the policies of the Act, and it would result in the imposition of a standard virtually indistinguishable from one of strict or absolute liability, which Congress through section [666(j)] specifically eschewed.<sup>81</sup>

Although the findings of the Fifth Circuit in *Getty* and in *Horne* differ in result, the cases are reconcilable. The courts in both cases focused on the statutory requirement of showing employer knowledge of the dangerous circumstances.<sup>82</sup> *Getty* upheld the Commission's determination that the employer failed to exercise reasonable diligence in obtaining knowledge of the dangerous condition.<sup>83</sup> *Horne* found that the employer had exercised reasonable diligence,<sup>84</sup> and then refused to impute to him the knowledge of the foremen.<sup>85</sup> In *Getty*, however, there is an implicit imputation of the negligence of the supervisory personnel to the employer. The court found that the supervisors could have ascertained the dangerous condition with reasonable diligence.<sup>86</sup> Their failure to inquire became the corporation's failure. This seeming conflict between the cases is attributable to two factual differences. First, *Horne* was a solely owned proprietorship. The employer-proprietor had left the worksite just prior

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78. *Id.* at 567.

79. *Id.* at 568.

80. *Id.* at 571.

81. *Id.*

82. 530 F.2d at 1145; 528 F.2d at 568.

83. 530 F.2d at 1146.

84. 528 F.2d at 469. "On the facts of this case it is readily apparent that Mr. Horne [the employer] did everything within his power to ensure compliance with the law. . . ." *Id.*

85. See note 80 and accompanying text *supra*.

86. See notes 71-72 and accompanying text *supra*.

to the accident after finding adherence to all safety measures.<sup>87</sup> On the other hand, Getty was a corporation. The policies of a corporation as large as Getty can only be implemented through its supervisory personnel. Taken one step further, a corporation such as Getty can only have knowledge of the existence of a violation through its supervisors. As a second basis for distinction, *Horne* concerned foremen engaging in conduct hazardous to their own health and safety. Getty, however, involved designated personnel acting in a supervisory capacity. Their failure to inquire represented a danger to rank and file employees. Therefore, if in *Horne* two workmen were killed and a foreman was supervising, then it is possible the employer would have been found liable despite his diligence in issuing safety instructions. This possibility is severely, and correctly limited by the Fifth Circuit's indication that the employer's duty is not an absolute one.<sup>88</sup> The Fifth Circuit, however, has not stated a clear test to be applied in situations where violations of the Act occur due to supervisory failure.

*Cape and Vineyard Division of the New Bedford Gas and Edison Co. v. OSHRC*<sup>89</sup> concerned the electrocution of a lineman employed by a utility company. The company was found in violation of a promulgated safety standard requiring the wearing of protective clothing "whenever it is necessary."<sup>90</sup> The administrative law judge and the Commission found that employer violated the Act when its foreman, in the light of substantial probability of death or serious physical injury, allowed the lineman to determine for himself the necessity of safety equipment.<sup>91</sup> The First Circuit reversed, holding that the regulation was insufficient by itself to give the company notice that additional protective equipment was needed under the circumstances.<sup>92</sup> The court, however, noted that actual knowledge of a hazardous practice would satisfy the requirement of fair notice,<sup>93</sup> and indicated that a company's own safety rules could pro-

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87. *Id.* Ironically, Mr. Horne left the worksite to attend a safety seminar. 528 F.2d at 569.

88. 530 F.2d at 1143; 528 F.2d at 571.

89. 512 F.2d 1148 (1st Cir. 1975).

90. 29 C.F.R. § 1910.132(a) (1977).

91. 512 F.2d at 1151-52. The accident occurred directly after the lineman told another employee, working with him on the buddy system, that he did not need additional safety equipment. *Id.* at 1151.

92. *Id.* at 1152.

93. *Id.* Absent a showing of actual knowledge, the court would ask "whether a reasonably

perly be considered as evidence of that knowledge.<sup>94</sup>

*New Bedford Gas* also agreed with the administrative law judge that the implementation of the safety rules was the function of the foreman.<sup>95</sup> The First Circuit refused to require continuous supervision as a method of implementation.<sup>96</sup> The case, however, turns on the failure of the regulation to give adequate notice.<sup>97</sup> The court stated: "the company was not charged with negligent lack of supervision or of any other violation of the general duty clause, but rather with failure to comply with the protective equipment standard."<sup>98</sup> Although the decision is limited to the inadequacy of the regulation under the circumstances, the court thus indicates that it would accept negligent supervision as a basis of finding an employer liable for the actions of its foremen. The degree to which the First Circuit would hold an employer liable for lack of supervision is not apparent from *New Bedford Gas*.

The Seventh Circuit, in *Brennan v. Butler Lime and Cement Co.*<sup>99</sup> was confronted with the actions of a rank and file employee resulting in his own death. In deciding the issue of the employer's liability for these acts, the court states, "that if an employee is negligent or creates a violation of a safety standard, that does not necessarily prevent the employer from being held responsible for the violation."<sup>100</sup>

In *Butler Lime and Cement*, an employee delivering cement to a construction site was electrocuted when he brought the boom of his employer's crane too close to an overhead power line. The employee acted in violation of a promulgated safety standard that provides that crane boom should not be brought within ten feet of a certain class of energized lines.<sup>101</sup> The Commission affirmed the finding of the administrative law judge that the employer should not be held liable in light of its past safety record and the circumstances of the

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prudent man familiar with the circumstances of the industry would have protected against the hazard." *Id.*

94. *Id.* at 1154.

95. *Id.*

96. *Id.* at 1155.

97. *Id.*

98. *Id.*

99. 520 F.2d 1011 (7th Cir. 1975).

100. *Id.* at 1017.

101. 29 C.F.R. § 1910.180(j)(i)(1977).

accident tending to show it was unforeseeable.<sup>102</sup> The Seventh Circuit rejected this analysis, and agreed with dissenting Commissioner Cleary, "that the administrative law judge erroneously shifted responsibility for compliance from [the employer] to the electrocuted employee. . . ." <sup>103</sup> The court, implying an imputation theory, asserted that the employer's violation of its specific duty under the Act occurred at the moment its employee brought the boom within ten feet of the power lines in noncompliance with the standard.<sup>104</sup> The court, however, would limit the employer's liability by requiring reasonable diligence in discovering employee violations of safety regulations.<sup>105</sup> Applying this standard, *Butler Lime and Cement* found that the employer failed to act with reasonable diligence because of the inadequacy of its safety-training program.<sup>106</sup>

Since *Butler Lime and Cement* did not concern actions of supervisory personnel resulting in employee injury, the question arises as to how the Seventh Circuit would handle that situation. Given the court's willingness to find an employer liable for the negligent conduct of employees,<sup>107</sup> it is likely that the court would afford the same treatment to the acts of foremen. It is unclear, however, whether the circuit would equate foremen with employees or consider them an extension of management. If the circuit considers foremen equivalent to employees under the Act, then it is likely the reasonable diligence test stated in *Butler Lime and Cement* would apply to limit employer liability for the conduct of foremen as well.

*Brennan v. OSHRC (Hanovia)*,<sup>108</sup> concerned employer responsibility for the actions of an employee resulting in his own death. In that case a technician for a lamp manufacturer was electrocuted while conducting an experiment for his employer. The evidence established that the technician was acting in violation of "universally

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102. 520 F.2d at 1016.

103. *Id.* at 1017.

104. *Id.*

105. *Id.*

106. *Id.* at 1016-17 "[T]he evidence as to the adequacy of Butler's safety program was sharply split. Yet the administrative law judge failed to make a clear finding on this important issue." *Id.* at 1016. The court stated further that "[o]nly the dissenting Commissioner spoke to the point." *Id.* at 1017. Thus, the court felt competent to rule on the issue of the adequacy of the company's safety program in light of the standard of review with respect to questions of fact of substantial evidence on the record considered as a whole. *Id.*

107. See note 98 and accompanying text *supra*.

108. 502 F.2d 946 (3rd Cir. 1974).

recognized safety standards."<sup>109</sup> The Third Circuit found that the Act did not impose strict liability "for the results of idiosyncratic, demented, or perhaps suicidal self-exposure of employees to recognized hazards."<sup>110</sup> The court did find that the general duty clause requires employers to prevent hazardous conduct by employees.<sup>111</sup> The court remanded the Commission's no violation order because it failed to deal with the issue of adequate supervision under the circumstances.<sup>112</sup>

The *Hanovia* court was not asked to decide an employer's liability for injuries resulting from the acts of supervisory personnel. Its refusal to apply a standard of strict liability indicates that it would endeavor to limit liability in those circumstances. The court's holding, however, concerning the employer's duty to provide adequate supervision suggests that the circuit might hold an employer to a greater degree of responsibility for the conduct of employees acting in a supervisory capacity.

## B. Willful Violation Cases

*Ocean* involved a serious but not willful violation of the Act.<sup>113</sup> In its imputation analysis, however, the court adopted the rationale applied in two willful violation cases.<sup>114</sup>

In *United States v. Dye Construction Co.*,<sup>115</sup> the Tenth Circuit upheld a trial court conviction of a corporation, under the criminal penalties provisions of the Act,<sup>116</sup> for willful failure to shore or slope a trench, resulting in the death of a workman.<sup>117</sup> In so finding, the court clearly applied the doctrine of *respondeat superior* to find willfulness under the Act. It stated:

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109. *Id.* at 950.

110. *Id.* at 951. Another issue within the case was the proper scope of judicial review of the adjudicatory conclusions of the Commission.

111. *Id.*

112. *Id.* at 953.

113. See notes 28-42 and accompanying text *supra*.

114. *Ocean*, slip op. at 8-9. The court stated:

We do not have before us a charge of willful violation of the Act, and therefore do not have to decide whether we would follow the First and Tenth Circuits in imputing employer's knowledge to a corporation in such circumstances. We do, however, think the logic of their approach is applicable in the instant case.

*Id.* at 9.

115. 510 F.2d 78.

116. 29 U.S.C. § 666(e) (1970).

117. 510 F.2d at 84.

We find no merit in the further contention that the corporation cannot be guilty of willfulness based on the acts, conduct and inferentially the states of mind of the employees. . . . [T]he president is not the only individual whose state of mind would be relevant. The cases recognize that corporations are responsible for the acts and omissions of their authorized agents acting in the scope of their employment.<sup>118</sup>

Interestingly, in *Dye*, only two of the three persons present at the time of the accident were foremen. The court never distinguished between the functions of the foremen and the other employee. Rather, in upholding the conviction, *Dye* stated that it was within the province of the jury to find willfulness from any one of these persons.<sup>119</sup>

The First Circuit, in *F.X. Messina Construction Corp. v. OSHRC*,<sup>120</sup> upheld the Commission's order affirming a finding of a willful violation.<sup>121</sup> The court imputed the willful actions of a foreman to his employer.<sup>122</sup> Unlike *Dye*, *F. X. Messina* clearly holds that the operative state of mind was that of the foreman.<sup>123</sup> The court states: "Petitioner, through its foreman, made its choice, a conscious, intentional, deliberate, voluntary decision. . . ." <sup>124</sup>

*Ocean*<sup>125</sup> also cited another willful violation case, *Intercounty Construction Co. v. OSHRC*,<sup>126</sup> as lending analogous support to its decision. In *Intercounty*, the Fourth Circuit upheld a commission order finding that an employer had committed a willful violation when its job foreman failed to heed safety instructions given by OSHA to the company.<sup>127</sup> The court refused to accept the employer's argument that the violation was not willful due to the foreman's good faith belief that the area was safe.<sup>128</sup>

### C. *Floyd S. Pike Electrical Contractor Inc. v. OSHRC*

One month before *Ocean* was decided, the Fourth Circuit dealt with similar issues in *Floyd S. Pike Electrical Contractor Inc. v.*

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118. *Id.* at 82.

119. *Id.*

120. 505 F.2d 701 (1st Cir. 1974).

121. *Id.* at 702.

122. *Id.*

123. *Id.*

124. *Ocean*, slip op. at 9.

125. 522 F.2d 777 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976).

126. *Id.* at 781.

127. The opinion of the court was joined by Judge Field who dissented in *Ocean*.

128. 522 F.2d at 779.



OSHRC.<sup>129</sup> In *Pike*, the court vacated and remanded an order of the Commission imputing a foreman's knowledge of hazardous conditions to his employer.<sup>130</sup> The conditions, which were in violation of a safety standard,<sup>131</sup> resulted in the foreman's death. The case was remanded for reconsideration in light of the Commission's later decision in *Secretary v. Engineers Construction Inc.*<sup>132</sup> In that case, an employer was cited for a violation of a safety standard requiring the shoring of trenches<sup>133</sup> when its foreman was discovered working in an unsafe trench.<sup>134</sup> The administrative law judge held the company liable for the actions of the foreman who had specific knowledge of the safety standard and was subjected to internal disciplinary sanctions.<sup>135</sup> The Commission stated in reversing, "the Act does not impose absolute liability upon employers when an employee fails to follow established safety practices."<sup>136</sup> The Fourth Circuit in *Pike* read *Engineers* as applying a new standard of liability for employers and therefore remanded the case.<sup>137</sup>

None of the opinions in *Ocean* cited either *Pike* or *Engineers*. This is curious since in *Ocean* the circuit adopted a theory of liability very similar to that put forward by the Commission in *Pike* and abandoned in *Engineers*.

The factual situations in *Ocean* and *Pike* are somewhat different. The foreman's actions in *Pike* led to his own death. In *Ocean*, the foreman's acts and orders in contravention of the safety standard resulted in the death of a rank and file employee. Indeed, *Ocean* limited its holding to the facts of that case:

What this case is not about must first be noted. It is not a case in which a rank-and-file employee engaged in a suicidal or willfully reckless act that led to his own injury. Rather it is one in which a foreman, whom the Company had made responsible for insuring the safe performance of a job, negligently created an unsafe condition and then ordered a subordinate employee into

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129. 557 F.2d 1045 (4th Cir. 1977).

130. *Id.* at 1046.

131. 29 C.F.R. § 1926.955(a)(6)(ii) (1977).

132. 3 EMPL. SAF. & HEALTH GUIDE (CCH) ¶ 20,012 (Sept. 29, 1975).

133. 29 C.F.R. § 1926.652(b) (1977).

134. The foreman was not injured.

135. 3 EMPL. SAF. & HEALTH GUIDE (CCH) ¶ 20,112 at 23,807.

136. *Id.*

137. 557 F.2d at 1045. The dissenting commissioner in *Engineers* also read that decision as being inconsistent with the law as stated by the Commission in *Pike*. 3 EMPL. SAF. & HEALTH GUIDE (CCH) ¶ 20,112, at 23,808.

the area of danger, as a result of which the employee was killed. We think that for the Act to be meaningful and effective the actions of the foreman must be imputed to the company *in this situation*.<sup>138</sup>

This distinction can also be applied to the majority of decisions dealing with employer liability for employee conduct.<sup>139</sup> The decisions of *REA Express*, *Getty*, and *New Bedford Gas*, however, cannot be factually distinguished since they all involve situations where employee death was traceable to supervisory failure. As noted earlier, *REA Express* might be applying an imputation theory of liability, but the court does not make a clear distinction between foremen and employees.<sup>140</sup> The same is true of the Fifth Circuit's decision in *Getty*.<sup>141</sup> In *New Bedford Gas*, the First Circuit discussed the responsibility of supervisory personnel and employers to guard against hazardous employee conduct, but decided on the ground that the applicable regulation afforded inadequate notice under the circumstances.<sup>142</sup> Despite imputation concepts at work in these and other decisions, the Fourth Circuit, in *Ocean* became the first circuit to apply the standard of *respondeat superior* to hold an employer liable under the Act for the conduct of its foremen. More important, *Ocean* is also the first case to hold an employer to a higher standard of liability for its supervisory personnel than for its other employees.

#### IV. Conclusion

In addition to its factual restriction, *Ocean* is limited further by the disagreement among its opinions on the extent of employer liability for supervisory action. In fact, both concurrence and dissent rejected the prevailing opinion's adoption of a rule of responsibility based on the doctrine of *respondeat superior* as creating a standard of absolute liability.<sup>143</sup> Considering this disparity between the opinions, *Ocean* seems somewhat of an aberration. Further, there is no precedent involving serious violations that supports *Ocean's* adoption of the imputation rationale used in willful violation cases to

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138. *Ocean*, slip op. at 5-6.

139. *National Realty*, *Horne*, *Butler Lime and Cement*, and *Hanovia* all concerned employees killed due to their own negligence or suicidal recklessness. The employees in *National Realty* and *Horne*, however, were foremen.

140. See text accompanying notes 63-69 *supra*.

141. See text accompanying notes 70-74 *supra*.

142. See text accompanying notes 87-96 *supra*.

143. See *Ocean*, slip op. at 13-14 (Haynesworth, C.J., concurring); *id.* at 17-22 (Field, J., dissenting).

find employer willfulness.

Regardless of the ultimate weight afforded the prevailing opinion in *Ocean*, factually the case presents a question towards which the congressional intent is unclear. That is, are supervisory personnel to be treated as employees or as extensions of the employer? The majority opinion in *Ocean* finds that foremen acting in their supervisory capacity should be equated with their employer. Despite the disagreement of the concurrence and dissent and indications that other circuits would decide the question differently, *Ocean's* approach has merit. Contrary to the conclusions of the concurring and dissenting opinions, the application of the doctrine of *respondeat superior* in *Ocean* does not create a standard of strict liability. The majority builds an inherent limitation of liability by requiring that foreman be working within the scope of their employment before liability is occasioned.<sup>144</sup> Indeed, *National Realty* took notice that an employer might rightfully be held more accountable for the actions of its supervisors.<sup>145</sup> The foreman's function of ensuring the observance of safety standards is perhaps the most convincing reason for this heightened accountability. While foremen and employees in similar supervisory roles do not formulate a company's safety policy, they do implement it. The method of implementation has a direct effect on the conditions of employment, which are the ultimate concern of the Act.

An employer should not be allowed to hide behind his supervisor's unsafe decisions in favor of haste and cost effectiveness. Such supervisory decisions, even if negligently made, ultimately benefit the employer to the detriment of the worker. The Act became law because the implementation of safety precautions formed a "competitive disadvantage" for conscientious employers.<sup>146</sup> This purpose should not be defeated.

Despite the value of the approach taken in *Ocean*, the Fourth Circuit's decisions in this area seem somewhat incongruous. In *Pike*, the Commission's application of a theory of liability based on *respondeat superior* was, in effect, rejected. In *Ocean*, however, the circuit indicated that the concept was appropriate in a similar factual situation. If the role of the courts under the Act is to provide

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144. *Id.* at 11.

145. 489 F.2d at 1267 n. 38.

146. S. REP. No. 1282, 91st Cong., 2d Sess. 4 (1970).

guidance to the administrative bodies on legal questions, then more definitive word in this area is required. The majority in *Ocean* should have specifically distinguished *Pike* on its facts. As a result of the seeming inconsistency between the cases, the Commission cannot be expected to decide similar questions in the same manner as *Ocean*.

Finally, the other circuits have either not been presented with the issue of a differing standard of liability for supervisors, or have not addressed it clearly. The burden is now upon the other courts of appeals to accept or reject the approach taken in *Ocean*, and if accepted, to further establish its limits.

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